U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 14 October 2005

BALCA Case No.: 2004-INA-00127
ETA Case No.: P2003-NJ-02491894

In the Matter of:

PACCELLI & FERREIRA CONSTRUCTION, INC.
Employer,

on behalf of

EDVALDO SILVA,
Alien.

Appearance: Cassandre Lamarre, Esquire
Newark, New Jersey

Certifying Officer: Dolores DeHaan
New York, New York

Before: **Burke, Chapman and Vittone**
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. Paccelli & Ferreira Construction ("Employer") filed an application for labor certification[1] on behalf of Edvaldo Silva ("Alien") on April 30, 2001. (AF 12).[2] Employer seeks to employ Alien as a Truss Carpenter (Occ. Code: 860-381-022). *Id.* This decision is based on

[1] Alien labor certification is governed by the Immigration and Nationality Act, 8 U.S.C. § 1182 (a)(5)(A) and 20 C.F.R. Part 656. This application was filed prior to the effective date of the "PERM" regulations. *See* 69 Fed. Reg. 77326 (Dec. 27, 2005). Accordingly, the regulatory citations in this decision are to the 2004 edition of the Code of Federal Regulations published by the Government Printing Office on behalf of the Office of the Federal Register, National Archives and Record Administration, 20 C.F.R. Part 656 (Revised as of Apr. 1, 2004), unless otherwise noted.

[2] In this decision, AF is an abbreviation for Appeal File.

the record upon which the Certifying Officer ("CO") denied certification and Employer's request for review, as contained in the Appeal File. 20 C.F.R. § 656.27(c).

BACKGROUND

In its application, Employer described the duties of the position as follows: "Erects premade wood roof trusses on top plates of frame structures, using hammer, nails, saws, levels and other hand and power tools. Prepares layout for positioning trusses from building plans and blueprints. Supervises one truss carpenter helper." The Employer required three years of experience in the job offered. (AF 26). The Employer also requested Reduction in Recruitment ("RIR") processing. (AF 1).

In the Notice of Findings ("NOF"), issued September 30, 2003, the CO stated, "Employer's request for Reduction in Recruitment (RIR) processing is denied". The CO also found that there is a question whether the job opportunity is for permanent, full-time work as required by 20 C.F.R. § 656.3 and whether the job opportunity is clearly open to any qualified U.S. worker as required by section 656.20(c)(8). The CO noted that the telephone number listed on item 5 of the ETA 750A and in Employer's advertising was for Carla Selvera, 90 Rome Street, Newark, New Jersey. The Employer was not listed in the Newark telephone directory, although a listing on the internet showed a different telephone number for the company. In addition, the company's FEIN number is not listed in the New Jersey Unemployment Insurance (UI) computer system. The CO stated there is no apparent relationship between Carla Selvera and Pacceli & Ferreira Construction, however, her address is the same address as the Alien. The CO stated that Employer must document the relationship between Carla Selvera and Pacceli & Ferreira Construction. In addition, Employer must document the company's business location and telephone numbers.

The CO also noted that the Alien is an owner of the Employer/corporation and a stockholder. Under such circumstances, Employer must submit evidence documenting the corporation's independence from its stockholders and furnish the financial history of the corporation, including the amount of investment of each shareholder and the percentage such investment constitutes of the total investment in the corporation.

The CO also noted differences in spelling; in some places the company is listed as Pacelli & Ferreira Construction, Inc. and in other places it is listed as Pacceli & Ferreira. In addition, the Alien signed other applications for labor certifications on ETA 750A from this same Employer as the owner and the applications indicate the business is a partnership. The signatures of the Alien as the owner/employer on the other applications agrees with the Alien's signature on the documents submitted in this case. The CO directed Employer to furnish the correct name of his company, give the company history, including the date the business began, whether it has been a partnership or a corporation (and if both, give complete dates for each), and provide the names of the partners/corporate officers since its inception. The CO noted that if the business is a partnership, it is unsuitable for labor certification.

In addition, the CO stated that Employer must submit documentation of the specifics of its business. This included lists of employees and job duties, and whether the employees are full-time or part-time. The CO requested copies of W-2 forms or 1099 MISC forms for 2001 and 2002. Finally, the CO stated that Employer must document why there is no record of his company in the state UI system and furnish the company federal tax returns for 2001 and 2002.

The CO also noted that a previous application on behalf of a truss carpenter had received certification. Therefore, the CO required Employer to document how he can guarantee permanent, full-time employment for two truss carpenters performing solely those duties shown in item 13 of the 750 A form. The Employer was directed to furnish copies of contracts as evidence. The CO also noted problems with the documentation of the Alien's experience. Specifically, letters from other companies were not signed by the owners of those companies who had signed other applications for labor certification. Employer could rebut the finding that the Alien did not have the required experience by documenting the Alien's previous experience in detail as specified in the NOF or by deleting the requirement for the three years of experience in the job offered.

Finally, the CO noted that Employer must document its willingness to advertise and stated, "employer's willingness to advertise is not a cure for the deficiencies cited in this Notice of Findings." (AF 39-42).

Employer submitted rebuttal, which was received on November 20, 2003 and written by Josue Silva Ferreira, "Employer." (AF 43-88). Employer explained that the company has three telephone numbers and one number is under Carla Selvera's name who is the secretary-treasurer of the company. Employer also explained that Ms. Selvera lived on the first floor at 90 Rome Street and that the Alien lives on the third floor at that same address. Employer stated that the Alien was asked to be a partner at one point in 2000, however, the Alien resigned as President shortly afterwards. Employer explained that the business began in March, 1994. At that time, Mr. Antonio Pacelli Da Silva was president, Josue Silva Ferreira was the vice president, and "Carla has always been the right arm of the company." According to Employer, the business was incorporated in 2000 and does framing work for housing and buildings all the way up to roofs. (AF 88).

A statement from the Alien dated November 4, 2003 confirmed that he was asked to come in as a partner for a very brief period. The Alien also stated that the letters of experience included with this application were not letters which he submitted, but were submitted by his prior agent. Copies of those letters submitted with this rebuttal had the words, "Not Mine" written on them. (AF 87, 60-61).

In addition, Employer included some of the documentation requested in the NOF. This included pictures of some work sites, a list of employees for 2001, 2002 and presently, (AF 84), W-2 forms for five employees for 2001, (AF 73-75), W-2 forms for nine employees for 2002, (AF 63-72), and three invoices for work dated 4/30/03, 6/14/03 and 8/20/03. (AF 81-83). Employer also submitted a statement from F. Seiam, President/ Owner of FHS Associates, LLC Development and Investment, which stated that the Alien worked for this company from March, 1992 to October, 1995 as a truss carpenter, doing roofing and framing. (AF –76). Employer submitted one page of a four page Verizon telephone bill for 973-274-[XXXX] in the name of Carla Selvera at 94 Brill, Newark, New Jersey dated October 5, 2003. (AF 62).

Employer also submitted minutes of the Directors Meeting dated August 12, 2000, which indicated that Edvaldo Paccelia da Silva relinquished all his shares and interest in the company to Josue Silva for one dollar. (AF 59). A Certificate of Incorporation dated January 23, 2001 was submitted. It included a business address of 94 Brill Street, Newark, New Jersey. (AF 58). Unsigned copies of Employer's corporate income tax returns for 2001 and 2002 were submitted. The 2001 tax return listed an EIN of 22-2987262 and the 2002 tax return listed an EIN of 01-0744921. (AF 46-54). In his letter accompanying the rebuttal evidence, Employer stated, "Lastly, I am willing to re-advertise at your request." (AF 88).

The CO issued a second Notice of Findings ("NOF-2") on December 17, 2003. (AF 89-91). The NOF-2 initially noted that the documentation establishes that the Alien is not an owner or corporate officer so the job offer is not self-employment. The deficiencies noted in the first NOF related to this issue were, therefore, removed.

The CO noted again, however, that there is no listing for Employer or for the FEIN submitted in the New Jersey Unemployment Insurance computer system. The W-2 forms submitted by Employer appeared to indicate that deductions for unemployment insurance were made. Employer did not submit any explanation as to why his company is not listed in the UI system. Since deductions appeared to be made, Employer was again directed to document why there is no record of his company in the state UI system. In particular, documentation should include copies of Form NJ 927 (Employer's Quarterly report) and Form W-30 (Employer Report of Wages Paid) for all quarters from 2001, 2002 and 2003 to date. If Employer has not filed these reports quarterly, Employer was directed to fully explain why such reports were not filed. The CO stated that failure to file such reports is a violation of 20 C.F.R. § 656.20(c), which states that an Employer's job opportunity terms, conditions, and occupational employment shall not be contrary to federal or state law.

The CO also found that the copies of three invoices did not document support for full-time, permanent employment for all the truss carpenters listed on Employer's employee list. The CO noted that only one of the invoices documented installation of premade wood trusses, while

the other two documented work on foundations, walls and frame work on a house and frame work for other lots. The CO found that the invoices did not establish permanent, full-time employment for four full-time truss carpenters as listed on the employee list. The CO again instructed Employer to document how he can guarantee permanent, full-time work for the Alien as a truss carpenter performing the duties listed in item 13 of 750A form as well as for the other three full-time truss carpenters. Finally, the CO explained that the application should be amended to reflect the Alien's work experience with the employer as well as any other employment the Alien has had since October, 1995. (AF 89-91).

In response to the second NOF, Employer submitted an undated letter in which he stated that he stopped paying into the UI system in 2003 because he was having problems with the social security numbers for his workers matching up to their computers. (AF 99). Employer also submitted more pictures of work showing houses he is building, including the foundation of a house "we are about to do." In addition, an amended form 750B listing the Alien's employment with Employer was submitted. (AF 93-95).

On February 9, 2004, the CO issued a Final Determination denying Employer's application for labor certification. (AF 100-101). The CO found that Employer's documentation was not sufficient. Specifically, Employer's statements about the work he would be performing do not satisfactorily document that he can guarantee permanent, full-time, year-round employment performing the job duties listed in this application. In addition, the CO stated that pictures of a house being built are insufficient evidence to show that they were under contract with Employer's company.

The CO also stated that Employer's admission that he did not pay unemployment insurance in 2003 and that he will register his number and pay again are not sufficient to rebut the deficiencies related to this issue. Employer did not explain why the UI system has no record at all of his company or FEIN if he had paid in the past. The CO stated that since Employer failed to provide the documentation requested on the unemployment insurance issue, the response failed to adequately rebut the NOF and therefore, the application was denied.

On February 20, 2004, Employer requested review. (AF 112-113). In its request for review, Employer stated that his "regular legal workers" refused to pay into the unemployment insurance system since they wanted cash. Employer stated further that he does not have copies of forms because he could not find them. Employer argued that the pictures document that he has work, and he stated that he is willing for the CO to send an investigator to his work sites to see the work. Employer also argued that he has the ability to pay the prevailing wage and stated that he had provided sufficient proof to guarantee full-time employment. The case was docketed by the Board of Alien Labor Certification Appeals ("Board") on May 20, 2004.

DISCUSSION

Initially, we note that this application was before the CO in the posture of a request for RIR. In *Compaq Computer Corp.*, 2002-INA-249 (Sept. 3, 2003), this panel held that when the CO denies an RIR, such a denial should result in the remand of the application to the local job service for regular processing. Since *Compaq Computer, Corp.,* however, this panel recognized that a remand is not required in those circumstances where the application is so fundamentally flawed that a remand would be pointless. *Beith Aharon*, 2003-INA-300 (Nov. 18, 2004). For the reasons described below, we conclude that the instant case falls squarely within the exception enunciated in *Beith Aharon*.

Here, the CO noted deficiencies with the labor application, in particular the fact that Employer was not registered with the state unemployment insurance system. Employer acknowledged that fact in his rebuttal to the second NOF and in his request for review. The Employer did not discuss the fact that the W-2 forms show that unemployment taxes have been withheld, but apparently were not paid into the unemployment insurance system since there is no record of his company prior to 2003.

Failure to file the appropriate forms with the unemployment insurance system is a violation of 20 C.F.R. § 656.20(c)(7), which states clearly that a job opportunity, terms, conditions and occupational environment shall not be contrary to federal or state law. Noncompliance with state requirements or obligations arising by virtue of the employment relationship is grounds for denial. *East West Wonders, Inc.,* 1988-INA-51 (Jan. 16, 1992). Since

Employer admitted that he did not report the wages on a quarterly basis in 2003, and since Employer has not contradicted the evidence indicating that he withheld unemployment insurance but did not submit those contributions to the unemployment insurance system in 2001 and 2002, he is clearly not in compliance with the state unemployment insurance requirements. In this case, Employer's acknowledgement of these fundamental flaws with his application demonstrates that a remand would be pointless. Accordingly, because Employer's employment opportunity is not in compliance with state law as required by 20 C.F.R. 767.20(c)(7), we find labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED.**

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.